No. 84-925

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GENERAL MARINE TRANSPORT CORP.,

Petitioner,

—v.—

JOSEPH O'HARE, ALBERT M. CORNETTE, PETER GALE, BRUCE A. MCALLISTER, ROBERT W. SANDERS, THOMAS E. MORAN, as Trustees of the NEW YORK MARINE TOWING & TRANSPORTATION INDUSTRY PENSION FUND & INSURANCE FUND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE PRIOR DECISIONS OF THE NLRB AND THE COURT OF APPEALS IN THIS CASE 1

II. PETITIONER COULD NOT KNOW IN 1976 THAT CONGRESS WOULD ENACT A STATUTE IN 1980 TO PENALIZE ITS REPUDIATION OF THE CONTRACT 4

III. PETITIONER IS A SETTLOR OF THE TRUST WITH A STATUTORY RIGHT TO SHARE IN ADMINISTRATION AND THUS HAS STANDING TO SEEK A PARTITION OF TRUST FUNDS TO ENSURE THAT THE CONTRIBUTIONS IT MADE ARE USED ONLY TO BENEFIT ITS EMPLOYEES 4

CONCLUSION 6

TABLE OF AUTHORITIES

Cases: PAGE

Local 50 Health Benefit Fund v. *Local 3 Welfare Fund*, 733 F.2d 229 (2d Cir. 1984) 5

Teamsters v. *California Consolidators, Inc.*, ____ U.S. ____, 53 U.S.L.W. 3263 (Oct. 9, 1984) 3

Statutes:

Labor Management Relations Act:

§ 301, 29 U.S.C. § 185 ..... *passim*

§ 302, 29 U.S.C. § 186..... 5

National Labor Relations Act:

§ 10(b), 29 U.S.C. § 160(b)..... *passim*

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ARGUMENT

POINT I

THE DECISION BELOW DIRECTLY CONFLICTS WITH THE PRIOR DECISIONS OF THE NLRB AND THE COURT OF APPEALS IN THIS CASE.

Respondents are incorrect in asserting that the decisions below do not conflict with the decisions of the NLRB (Respondents Brief at 4, 7-9). After petitioner repudiated the

contract and before Local 333 made "fresh demands" a year later, all NLRB decisions concluded that

> "the refusal of *any* of the charged parties [petitioner and affiliates] to execute the Association agreement cannot be deemed to constitute a violation of the [National Labor Relations Act] as alleged by you." (A79-80). (Emphasis added.)

The NLRB general counsel also concluded this on two separate occasions and the NLRB regional director reconfirmed the decision in dismissing other charges filed by Local 333 against petitioner (A104-107).

The NLRB never changed this conclusion. Local 333 again filed unfair labor practice charges on February 28, 1977, but the new charges differed from the earlier ones. This time Local 333 claimed that petitioner's refusal to abide by the agreement *after* the NLRB-held election was an unfair labor practice. The NLRB agreed, in a decision that did not consider petitioner's April 1976 repudiation of the contract (A99-121). Rather, the NLRB concluded that Local 333's "fresh demands" for a contract after an election which "altered the circumstances" required petitioner to honor the contract (A116). Thus, the NLRB *did not hold* that petitioner's repudiation of the contract in April 1976 was an unfair labor practice. Rather, the NLRB held that petitioner's *continued* refusal to honor the contract after the election one year later was an unfair labor practice.

However, the Second Circuit rejected the NLRB's "fresh demand" theory as well as the claim of "altered circumstances" based upon a "contract bar" (A87-89).[1] The court of appeals held that the § 10(b) six-month statute of limitations

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1 The Second Circuit explained that the term "contract bar" refers to the NLRB's policy in a representation case of relying on a collective bargaining agreement—even a disputed one—to bar an election. A decision that a contract bars an election does not make the agreement valid or make it an unfair labor practice to continue to dispute it (A88, n.8; A89).

prohibited any challenge to petitioner's refusal to honor the contract, even after Local 333 was willing to narrow its contract demands to the sludge vessels (A85-91). The court of appeals set aside the NLRB's unfair labor practice finding and this decision should have ended the matter.

Therefore, respondents are wrong in claiming that the jurisdictional problem here—whether the NLRB has exclusive jurisdiction to decide that an employer properly refused to honor a collective bargaining agreement—is different than the one in *Teamsters Local 70* v. *California Consolidators, Inc.*, 53 U.S.L.W. 3263 (Oct. 9, 1984) (denying cert.) (dissenting opinion). There, the union argued that a labor contract already applied to some employees should be extended to others based on rules governing collective bargaining developed in NLRB proceedings. Similarly, respondents' claim here—that a contract never applied to any employees should cover at least some—is based on rules governing multiemployer bargaining developed in NLRB proceedings. The NLRA gives the NLRB jurisdiction to resolve such disputes. The adverse effect of a § 301 action on the NLRB's jurisdiction is amply demonstrated because NLRB proceedings already have adjudicated that petitioner had no duty to honor the contract—either in April 1976 or in February 1977.

Finally, respondents misstate petitioner's position about the interference with collective bargaining which occurs if a contract can be enforced in a § 301 action even though it is unenforceable under the NLRA (Respondents' Brief at 8). Respondents contend this does not interfere with the employer's ability to bargain with *another* union (MEBA). But petitioner was referring to interference with its ability to bargain with Local 333 or Local 333 members—the union and employee parties to the disputed contract—in the face of a possible § 301 action. To illustrate, petitioner repudiated the contract because it purported to cover all its employees. Concerned that health insurance continue uninterrupted, petitioner wrote to respondents asking them to authorize the receipt of

contributions from petitioner pending resolution of the dispute (A44). When respondents failed to reply, petitioner purchased health insurance for its employees from another insurer. This arrangement was agreeable to the employees (and Local 333 did not object). However, many years later respondents have obtained a judgment that includes redundant health insurance contributions. Even the district court called this a "windfall" to respondents (A53-54).

An employer should be able to bargain with the union or employees to settle disputes or to reach interim arrangements during the course of disputes to minimize the disruption to labor relations. If trustees can maintain a § 301 action and upset the results—such as by requiring petitioner to pay for health insurance it already provided—the employer will not be able to bargain.

POINT II

PETITIONER COULD NOT KNOW IN 1976 THAT CONGRESS WOULD ENACT A STATUTE IN 1980 TO PENALIZE ITS REPUDIATION OF THE CONTRACT.

Respondents say petitioner should have known Congress was going to enact double interest penalties, impose attorneys' fees, and require health contributions to be made—even if the employer provided a separate health plan—four and one-half years before the statute was enacted (Respondents' Brief at 11-12). Petitioner could not have known. In 1976, the liability for breach of a collective bargaining agreement was restricted to compensatory damages in a common law or § 301 action. The Orwellian logic of respondents' argument demonstrates the Founding Fathers' wisdom in placing the due process and *ex post facto* clauses in the Constitution. The writ should be granted to eliminate the penalties and amounts in excess of compensatory damages imposed on petitioner.

POINT III

PETITIONER IS A SETTLOR OF THE TRUST WITH A STATUTORY RIGHT TO SHARE IN ADMINISTRATION AND THUS HAS STANDING TO SEEK A PARTITION OF TRUST FUNDS TO ENSURE THAT THE CONTRIBUTIONS IT MADE ARE USED ONLY TO BENEFIT ITS EMPLOYEES.

Respondents challenge petitioner's standing to protect the contributions petitioner made on behalf of its employees. However, petitioner is the settlor of the trust. In addition, 29 U.S.C. § 186(c)(5)(B) gives the employer the right to be equally represented with the union in administering employee trust funds. Petitioner cannot exercise its administration rights with respect to respondents because petitioner is not a party to any contract with Local 333 and not a member of the employers association that appoints the employer-trustees. Petitioner should be able to sue to partition the contributions into funds administered by trustees petitioner helps select and to ensure that the funds will benefit only its employees. Further, if petitioner is unable to sue, it is unlikely that any individual employee will have the wherewithal to do so.

Respondents also mistakenly claim that the employees have accumulated usable eligibility and benefit credits during the period covered by petitioner's contributions. However, the time period was too short to vest pension benefits, and both the health funds and future eligibility are unavailable because the employees are not Local 333 members. The employees can only enjoy the benefits of the contributions if these funds are partitioned—transferred to a separate fund or combined with MEBA funds—and administered for their benefit. *Compare Local 50 Health Benefit Funds* v. *Local 3 Welfare Funds,* 733 F.2d 229 (2d Cir. 1984). Only then can the employees accumulate sufficient service credit to vest benefits. Respondents' discussion of actuarial projections, break in service and similar concepts are irrelevant. Petitioner's employees exercised their

right to vote for MEBA rather than Local 333. There was no break in service—the employees engage in the same work now as they did before. Unless relief is granted to partition the funds, the monies may benefit someone's employees, but certainly not those of petitioner.

CONCLUSION

For the reasons stated above and in the petition, petitioner respectfully requests that the Court grant the writ of certiorari.

Dated: New York, New York
January 14, 1985

Respectfully submitted,

JARED STAMELL
Attorney for Petitioner